



Victorian Stage 4  
COVID-19 Construction Restrictions  
Key considerations for AMCA members

# Victorian Stage 4 COVID-19 Construction Restrictions

## Key considerations for AMCA members

Key consideration	Practical steps
<p><b>Contractual position</b></p>	<p>Which party bears the risk and cost of issues arising from COVID-19 restrictions will depend upon the terms of your specific contract. It is important that you review your contract to identify and familiarise yourself with provisions dealing with the following matters:</p> <ul style="list-style-type: none"> <li>▪ change in law;</li> <li>▪ force majeure;</li> <li>▪ suspension;</li> <li>▪ extension of time (EOT) and delay cost claims; and</li> <li>▪ termination for convenience.</li> </ul> <p>The Stage 4 restrictions for the Victorian building and construction industry limit the number of workers on site and prohibit them from working on more than one site during Stage 4. This will likely result in delays and/or disruption to your projects, and in turn, may cause you to be late in achieving completion and to incur additional onsite and offsite costs for a prolonged period. Usually, contractors, subcontractors and suppliers bear the risk and cost of complying with all relevant legislative requirements in force at the time of entering into the contract. However, the new laws being introduced by the Victorian Government in respect of the Stage 4 restrictions might entitle you to make variation and/or EOT claims if those new laws require changes to the work under the contract and/or cause delays and disruption. If your contract permits such claims, it is critical that you comply with any notice requirements – including making the notice within any mandatory timeframes. These timeframes may run from the commencement of the Stage 4 restrictions or when an actual delay is encountered. Check your contract carefully and err on the side of caution when calculating timeframes.</p> <p>‘Force majeure’ is only a potential avenue for relief if your contract contains a force majeure clause and the definition of ‘force majeure event’ expressly includes pandemics, or contains a sufficiently broad catch-all description capable of being construed as including the effects of a pandemic or the Government’s response to the pandemic. Again, be mindful of any notice requirements for EOT and delay cost claims.</p> <p>If you are directed to suspend works (i.e. if the principal or head contractor decides to shut down the entire project), check for any notice requirements which need to be complied with in order to claim for the time and costs associated with the suspension. If you are issuing directions for work to be suspended, give consideration as to what contractual claims this might expose you to, and whether you can negotiate an agreed suspension which mitigates/reduces any such exposure.</p> <p>In circumstances where the project is no longer feasible, you might find that principals and head contractors consider terminating contracts for their convenience (i.e. where there is no fault by the other party and no reasons for termination are required). This can only occur where the contract contains a termination for convenience clause (usually only the party higher in the contractual chain can exercise this right).</p> <p>If your contract is terminated for convenience, you should check to see if your contract entitles you to claim any costs associated with termination. Similarly, if you are considering terminating one of your contracts for convenience, be mindful of whether this will entitle the other party to claim termination costs. These matters will be dealt with expressly by the contract.</p>

Key consideration	Practical steps
Insurance	In our experience, it is unlikely that your insurance policies will respond to claims in relation to the effects of the COVID-19 restrictions (or only respond in very limited circumstances). However, specialist advice should be sought on this issue.
Complying with your contract	Unless your contract is validly terminated or you are directed to stop / suspend work (or an agreement regarding suspending works is reached), then you must continue to attempt to comply with your obligations under the contract. If you stop or suspend work without agreement or direction, you will be in breach of your contract (which may attract a claim for damages, and/or give the other party rights to terminate your contract).
Supply chain and building materials	The Stage 4 restrictions not only impact building and construction sites, but also the manufacture of certain products (some of which are directed to be closed for onsite work). Give consideration to whether any of the manufacturing restrictions may impact your supply chain and necessary building materials for your existing and upcoming projects. If necessary, look at alternative supply options to avoid delays caused by supply issues. This will include consideration as to delivery of the materials to sites, offsite storage options, and/or the security of any plant, equipment and materials stored with a third party or under the control of others.
Commercial discussions	<p>While your contract will dictate which party is required to bear the time and cost risks associated with the effects of COVID-19, including new laws, often the remedies will be inadequate and not necessarily mutually beneficial.</p> <p>In the interests of the long-term viability of the building and construction industry, parties should consider negotiating commercial and practical agreements to deal with the consequences of the new COVID-19 Stage 4 restrictions. Such negotiations should commence immediately, and should be done on the basis of the ‘best interests of the project’. Such agreements may include:</p> <ul style="list-style-type: none"> <li>▪ agreements to suspend works for a specified period and cost;</li> <li>▪ moratoriums on certain contractual claims (for instance, liquidated damages);</li> <li>▪ agreed EOTs and delay costs (potentially capped for a set period);</li> <li>▪ extending working hours / shifts to accommodate the limitations on the number of workers onsite; and</li> <li>▪ shorter payment terms to assist with cash flow.</li> </ul> <p>Where possible, consider conducting ‘whole of project’ discussions between the principal, head contractor and subcontractors to address issues with respect to the program for the works to best accommodate the limitations on the number of workers on site. For instance, explore options for scheduling particular trades/workforces for set ‘blocks’ so that they are able to complete works on one site and then move to another site (given the restriction on working on more than one site at a time).</p>
Record keeping	Despite all best efforts, the effects of the Stage 4 restrictions are likely to result in contractual claims and disputes for some within the industry. To put yourself in the best possible situation should this eventuate, it is critical to maintain detailed records of your correspondence, contractual notices and meeting minutes. Such records will be invaluable if you become involved in a formal dispute.

## KEY CONTACTS - MCCULLOUGH ROBERTSON



**MATT BRADBURY**

Partner – Construction and Infrastructure (Back End)

P +61 405 722 219

E [mbradbury@mccullough.com.au](mailto:mbradbury@mccullough.com.au)



**MICHAEL ROCHESTER**

Partner - Construction and Infrastructure (Front End)

P +61 420 293 075

E [mrochester@mccullough.com.au](mailto:mrochester@mccullough.com.au)



**BRITTANY PARKER**

Special Counsel – Construction and Infrastructure (Back End)

P +61 412 685 222

E [bparker@mccullough.com.au](mailto:bparker@mccullough.com.au)



**STRATI PANTGES**

Special Counsel - Construction and Infrastructure (Front End)

P +61 427 862 415

E [spantges@mccullough.com.au](mailto:spantges@mccullough.com.au)



**ALEX POWER**

Special Counsel - Construction and Infrastructure (Back End)

P +61 428 789 954

E [apower@mccullough.com.au](mailto:apower@mccullough.com.au)



**JOSEPH JONES**

Senior Associate – Construction and Infrastructure (Front End)

P +61 403 797 957

E [jjones@mccullough.com.au](mailto:jjones@mccullough.com.au)



**XAVIER MILNE**

Senior Associate – Construction and Infrastructure (Back End)

P +61 400 023 221

E [xmilne@mccullough.com.au](mailto:xmilne@mccullough.com.au)



**DAVID SAUNDERS**

Lawyer – Construction and Infrastructure (Front End)

P +61 405 150 319

E [dsaunders@mccullough.com.au](mailto:dsaunders@mccullough.com.au)